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# YALE LAW JOURNAL

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Bulletin No. 74 of the U. S. Bureau of Labor, dated January, 1908, and issued in May, is a document of the utmost importance to anyone who is interested in the subject of Employers' Liability. We know of no publication which can be compared with it for complete presentation of the present status of that subject. It begins with an admirable treatise of 120 pages on the American law upon the subject, which is followed by the text of all American constitutions and statutes which alter the common law, including the statutes of 1907. To this is added a clear statement of the law of each of the European countries and their dependencies as to employer's liability, with the full text of the British Workmen's Compensation Act of 1906, and of the Canadian Industrial Disputes Investigation Act of 1907; and a statement of the more important decisions of American courts on labor questions during the past year. This statement of the contents will show that the pamphlet is indispensable to any one who desires to investigate any phase of this most important subject.

E. P.

## DAMAGES UPON REPUDIATION OF A CONTRACT.

In the April number of this journal Professor Joseph H. Beale, Jr., sets forth very clearly the principles governing the measure of damages in cases of anticipatory repudiation of a contract. It seems to the writer than in one respect only is a criticism to be made of

his analysis. Professor Beale shows convincingly that where "the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time of the breach, but at the time set for performance." To this rule, however, he says there may be one exception: where parties have made a contract for the future delivery of a commodity of such a nature that the right to its future delivery has a present market value, and an anticipatory breach occurs, the measure of the damages is not the value of the contract at the time for performance, but the value of the contract at the time of the breach. The example given is a sale of oats for July delivery, and a repudiation occurs in April. July oats have a market value in April representing the April value of the contract right to July oats. It is submitted that even such a case as this is no exception to the general rule.

In the first place, *all* contract rights to a future performance have a *present* value, and in every case such value is different from the value of performance at the time set by the contract, and different from the value of a precisely similar performance at the present time. The fact that some contract rights or "futures" are quoted on an exchange while others are not, has no bearing upon the underlying principle. That fact merely goes to show that in some cases there is in existence first class evidence of the present value of a contract right to a future performance, while in other cases there may be little or none. This might be a practical reason for laying down different rules for the measure of damages in the two cases, but it is not a logical one. It may indeed be true that in all cases of an anticipatory breach the injured party should be given the present market value of his contract right as of the time of such breach. He ought not to complain at such a rule, for he himself is a consenting party. In all cases he has his option between acquiescing in the repudiation and rejecting it; and he should reject it in case he wishes the value of the contract at the time set for performance. This is a question forced upon us by the anticipatory breach doctrine as discovered in *Hochster v. Delatour*. But as Professor Beale shows, the question is no longer open, and the rule as to the measure of damages is that quoted at the beginning of this discussion.

In the second place, Professor Beale's reasons for the rule that "the repudiator of a contract cannot under any circumstances call upon the other party to make forward contracts for his benefit" are almost as conclusive against allowing the repudiator of a contract to escape on paying the market value of the contract right as

of the time of the anticipatory breach. Allowing the injured party only that amount, is in effect requiring him to make a forward contract for the benefit of the repudiator, depriving him of any benefit from the forward contract, though insuring him against any loss from it. The fact that the injured party is insured against any loss to accrue from the forward contract does not add to the merit of the rule. If anything, it detracts from it. The injured party has forecasted the future. He is entitled to profits accruing after the anticipatory breach as well as before. But to get them he must now make a forward contract based upon a new forecast. If the injured party's original forecast was bad, he should bear the losses consequent thereon, those accruing subsequent to the breach as well as before. In this case, he is not in fact an injured party at all. The repudiation is not an injury but a positive benefit. Yet the rule would require the repudiator to pay damages for conferring a benefit; or to express it in another way, would require the repudiator to pay the damages caused by the making of the forward contract. As Professor Beale says: "The fact is that the repudiator is entitled to the benefit of no contract of the other party except such as the other party could not have made but for the repudiation." And likewise, the fact is that the repudiator should be made to bear the burden of no contract except that which he has himself made.

Suppose the following: A sells to B 1,000 bushels of wheat at \$1.00 per bushel for delivery July 1. On April 1, wheat having risen, and July wheat being then quoted at \$1.10, A repudiates. Wheat continues to rise in price, and on July 1 is quoted at \$1.20 for immediate delivery. Under these circumstances, B should be entitled to \$200.00. If on April 1 B makes a forward purchase for July delivery of another 1,000 bushels of wheat at \$1.10, he is entitled to his profit of \$100.00 thereon, in addition to the \$200.00 on the first contract. But if B can hold A for damages based only upon the April price of July wheat, then B gets only \$200.00 profit on the two contracts instead of \$300.00. Again, suppose that after April 1 the price of wheat declines and on July 1 is once more \$1.00 per bushel for immediate delivery. On July 1, the time for performance, B could buy in the market for \$1.00, the contract price, and has lost nothing by reason of A's repudiation and non-performance. He should therefore not be given \$100.00 of A's money. In case B made a forward contract on April 1, as before, at \$1.10, the \$100.00 loss thereon should not be borne by A.

In case B sues A and the trial occurs before July 1, the thing

to be proved is the prospective value of the wheat on July 1, although the best evidence of what it will be is perhaps the market quotation of July wheat at the day of trial. A. L. C.

#### THE UNCONSTITUTIONALITY OF THE ERDMANN ACT OF 1898.

The Supreme Court of the United States dealt a deadly blow to labor unions in a recent decision, *Adair v. United States*, 28 Sup. Ct. Rep. 277, holding unconstitutional section 10 of the Erdmann Act passed in 1898, for this cut out the very heart of the entire Act. The real question in the case was, may Congress make it a criminal offence against the United States—as, by the 10th section of the Act of 1898, it does,—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization? The majority of the court based their opinion on the fact that in interfering with freedom of contract it was an unwarranted invasion of the right to personal liberty and property guaranteed by the Fifth Amendment. Also that the Act was not a regulation of commerce within the meaning of Art. I, Sec. 8, of the Constitution. One dissenting Justice argues that because of the purpose, to wit: the prevention of strikes, it is not a "gross perversion of the principle" of regulation and that because of the nature of the rights, namely, those exercised in a quasi-public business, they are subject to control in the interest of the public. The other dissenting Justice, admitting it to be a limited interference with freedom of contract, attempts to justify it on the grounds of public policy.

The rights guaranteed under the Fifth Amendment are something more than mere privileges of locomotion; the guaranty is the negation of arbitrary power in every form which results in a deprivation of a right. It is well recognized, however, that this right is limited to a certain extent by the "police power," both in the States (*Holden v. Hardy*, 169 U. S. 391), and in Congress, whose power, however, is not general but rests upon the enumerated powers given it by the Constitution. *Vid., dissenting opinion, Lottery Case*, 188 U. S. 365; *Freund on Police Power*, Sec. 65. But this must not be a mere pretext—become another and delusive name for supreme sovereignty—to be exercised free from constitutional restraint. *Lothner v. New York*, 198 U. S. 56.

Going now to the second ground on which the unconstitutionality is put, denying that the government can invoke the aid of the commerce clause to sustain the indictment, raising as it does a much more complex and embarrassingly difficult constitutional question and